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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

RICHARD CASTANEDA,

Plaintiff and Appellant,

v.

WESTCO EQUITIES, INC.,

Defendant and Respondent.

F074861

(Super. Ct. No. 14CECG02471)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Kristi Culver Kapetan, Judge.

Martin Glickfeld for Plaintiff and Appellant.

Wilson, Elser, Moskowitz, Edelman & Dicker, Edward P. Garson and David J. Gibson, for Defendant and Respondent.

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Plaintiff Richard Castaneda (Richard) sued defendant Westco Equities, Inc. (Westco) for breach of contract. The case was ordered to arbitration and Westco obtained an arbitration award in its favor. Richard appeals from the judgment entered upon the superior court's order granting Westco's request to confirm the arbitration award and denying Richard's request to vacate it.

One of the statutory grounds for granting a party's request to vacate an arbitration award is that "the rights of the party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefor." (Code Civ. Proc., § 1286.2. subd. (5).)[1] In this case, the arbitrator prejudicially denied Richard's request for a postponement to complete discovery, despite his showing of sufficient cause.

Richard argues that the award should have been vacated for a second reason as well: There were grounds for a reasonable doubt about the arbitrator's impartiality. (§§ 170.1, subd. (a)(6)(A)(iii), 1281.91, subd. (d), 1286.2, subd. (a)(6)(B).) We need not decide whether Richard made the necessary showing on this point, since we are ordering the award vacated on the above grounds instead. But Richard presented significant evidence relevant to this issue, and indicated an intention of gathering more had the postponement been granted. The matter can be raised again if the case is again ordered to arbitration before the same arbitrator.

We reverse the judgment.

FACTS AND PROCEDURAL HISTORY

The present case has its roots in a long-running dispute between Richard and his father, Henry Castaneda (Henry). On September 3, 2008, Richard and Henry participated in a mediation and settled superior court case No. 06CECG00225. The settlement

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[1] Subsequent statutory references are to the Code of Civil Procedure unless otherwise noted.

agreement provided that several parcels of real property jointly owned by the parties—apartment buildings and houses—would be managed by a property manager chosen by the parties. These were not to be sold during Henry's lifetime, and all the net income from them was to be paid to Henry on a monthly basis while he lived. The property manager's duties would be to "collect all rent, pay all expenses, and manage, repair, and maintain the properties." The parties were to abandon certain claims against each other and certain property sale proceeds were to be distributed, some to Henry and some to Richard and his siblings.

The mediator was a former Tulare County judge named Howard Broadman. The settlement agreement provided that if the parties were unable to agree on a property manager, Broadman would appoint one. Further, "[a]ny disputes regarding the maintenance or operation of the properties that cannot be resolved by Henry Castaneda and Richard Castaneda shall be subject to review and final decision by Judge Howard Broadman."

The parties did not agree on a property manager, and on September 12, 2008, Broadman appointed Westco. Richard and Henry subsequently entered into a property management contract with Westco. In a paragraph describing the responsibilities delegated by the owners to Westco, this contract stated that nonrecurring expenses of more than $1,000 per apartment or $5,000 total must be approved by the owners. It also stated: "If both property owners cannot agree on expense items, Judge Howard R. Broadman, retired, shall resolve disputes."

Richard filed a new lawsuit, superior court case No. 08CECG04214, on December 4, 2008, not long after the above arrangements were made. Henry filed a cross-complaint. The superior court's docket labels this case "Breach of Contract/Warranty," but the precise nature of the parties' claims there do not appear in the record of this case.

During the pendency of that case, it appears the parties submitted numerous matters to Broadman for resolution. Some of his orders in these matters are in the appellate record. Some provisions of the orders appear calculated not to resolve any dispute between Richard and Henry regarding disagreement over expenditures on the properties or otherwise, but instead to provide relief to Westco for complaints about the behavior of Richard and Henry, or to grant Westco permission to carry out repairs and improvements, permission for which it had applied to Broadman directly.

In an order dated January 12, 2009, Broadman denied Richard access to "past budgets, past account receivable information, past account payable information, credit reports, bank statements, repair documentation, books, ledgers, tax returns and related documentation." The same order imposed (and stayed) monetary sanctions against Henry for leasing a unit and authorizing repairs. On June 23, 2009, Broadman prohibited Richard and Henry from having face-to-face meetings with Westco personnel unless they first paid a deposit of $100 or $80 per hour, depending on whom they wished to speak to. Otherwise, all their communications with Westco were to be by email. Broadman prefaced this order with the following assertions:

> "The relationship between the father and son has deteriorated to an extent that is difficult to even imagine. This family unit has, at least for the time being, totally disintegrated.
>
> "The arbitrator finds that due to the social pathology between the two parties, they must be kept separated or there is a substantial probability of physical harm to one or both of them and the continued deterioration of both parties' individual mental health.
>
> "It is necessary to maintain the relationship with Westco Equities, Inc. or another property management company[;] however[,] continued contact between Richard and Henry and direct contact with Westco and their use of the management company to facilitate their continued disagreements will result in no management company [being] willing to work for these two people. In that event, the probability is that the parties

> will necessarily have to have a receiver appointed, which would incur additional costs to them."

In the same order, Broadman refused to remove Westco as property manager. Richard and Henry had both requested this on account of an increase in the vacancy rate at the property, and Richard wanted to manage the property himself.

On July 17, 2009, Broadman issued an amendment to the order of June 23, 2009, stating that it had been shown that between July 2 and July 10, 2009, Richard left 43 voicemail messages and sent many faxes to Westco. "Excess" calls to Westco would subsequently be billed at the same hourly rate as face-to-face meetings, and Richard was ordered to pay $2,900 for his previous calls. Further, unless Richard deposited $5,000 with Westco, Westco would not be required to listen or respond to his phone messages. Richard's attorney could call Westco for him without a deposit if there was an "emergency."

In an order dated February 3, 2010, Broadman dismissed Richard's complaint against Henry. He found for Richard on several of the causes of action in Henry's cross-complaint, including financial elder abuse and malicious prosecution. Broadman also found, however, that Richard was liable for elder abuse against Henry. He awarded $50,000 in damages against Richard, of which $40,000 was "stayed indefinitely unless after hearing it is determined that Richard Castaneda has contacted, harassed, or committed Elder Abuse upon Henry Castaneda." Broadman also awarded Henry $5,000 in costs. The superior court docket shows that this award was confirmed on May 20, 2010, and judgment in the amount of $15,000 was entered for Henry on June 6, 2010.

Broadman's order of February 22, 2013, stated that a hearing was held "to determine the nature and extent of any distribution of income from the earnings generated by the subject properties pursuant to the settlement agreement, as well as proposed capital improvements." Broadman ordered $75,000 to be paid to Henry from earnings retained in the trust account for the property, plus monthly payments of $2,500. Broadman also

ordered about $192,000 in maintenance, repair and improvement projects "submitted by Westco," to be completed at a time "determined at the discretion of Westco." In the same order, Broadman denied Richard's request to pay a man who had done some work on a property, because the work was not approved by Westco.

On February 23, 2013, Broadman issued an order lifting the stay on the remaining $40,000 of the prior award. This amount plus $4,706.25 in costs was awarded to Henry. The superior court confirmed the award and entered judgment for Henry in these amounts.

Richard filed the present action against Westco in San Francisco Superior Court on August 19, 2013. The complaint alleged a single cause of action for breach of the property management contract. It stated:

> "Generally, Defendant is obligated [by the property management contract] to manage rental properties owned by Richard Castaneda and/or his father, Henry. On or about February 2013, Plaintiff Richard Castaneda made formal requests to Defendant for detailed accounting of pertinent information relating to those properties and their management so that, among other things, he could assess Defendant's performance under the agreement and acquire information relating to the property, disposition of rents, repairs made, etc. In addition, Defendant sent Plaintiff a 1099 Form attributing income of $140,000 to Plaintiff which funds Plaintiff has not received. Plaintiff has also made inquires to Defendant regarding the 1099 form and the $140,000 without receiving an explanation or the funds. Defendant is obligated under the written agreement to respond to all of Plaintiff's requests and inquiries, as set forth above, as part of its express and implied duties under the agreement. Defendant has failed and refused to provide an accounting and/or to make explanations regarding its management of the properties or the 1099. Said conduct by Defendant constitutes a breach of the agreement and, furthermore, Plaintiff is now informed and believes and thereon alleges that Defendant has committed other and further breaches of the agreement and has failed to perform its management duties properly and Plaintiff is informed and believes he has been damaged as a proximate result of said breaches in an amount which exceeds $25,000 and/or which shall be shown according to proof."

The court granted Westco's motion for a transfer of venue to Fresno County on March 13, 2014. Westco answered the complaint on September 22, 2014, and subsequently filed a motion to consolidate the case with superior court case No. 08CECG04214. This motion was denied on October 23, 2014.

Westco filed a petition to compel arbitration on January 27, 2015. Richard opposed the petition, pointing out that Westco was not a party to the settlement agreement and arguing that the dispute between him and Westco did not fall within the scope of any arbitration clause. The trial court granted the petition. It ruled that Richard was equitably estopped from refusing to arbitrate because the issues raised by the complaint were inextricably intertwined with the arbitration proceedings pending in superior court case No. 08CECG04214, and because it might become necessary to join Henry as an indispensable party.

Prior to the arbitration hearing, Richard filed motions with Broadman to postpone the hearing and to disqualify Broadman. These motions are described in detail in the discussion later in this opinion. Broadman denied them.

At the arbitration hearing on May 5, 2016, Broadman granted Westco's motion for nonsuit, ruling that Richard had failed to prove damages. The arbitration award stated that Richard's cause of action for breach of contract failed. Subsequently, Broadman granted Westco's motion for attorneys' fees and costs, totaling $114,865.

Westco filed a petition to confirm the arbitration award in the trial court on August 23, 2016. On September 15, 2016, Richard filed both a response to Westco's petition, in which he requested vacatur of the arbitration award, and his own separate petition to vacate the award. Richard's own petition and his response to Westco's petition were substantively identical. They argued that the award should be vacated because (1) Broadman refused to grant a postponement of the arbitration hearing despite Richard's

showing of sufficient cause; and (2) Broadman refused to disqualify himself despite Richard's showing that a reasonable person could entertain a doubt about his impartiality.

On October 25, 2016, after a hearing, the trial court confirmed the award and denied Richard's request and petition to vacate it. In its written order, the court stated three conclusions. First, Richard's response and petition were filed late, and he did not make the showing necessary to obtain an extension; Westco would prevail for this reason alone. Second, Richard did not identify any clear grounds for—or present any admissible evidence supporting—his claim that Broadman should have disqualified himself. Finally, Richard did not support his claim that the arbitration hearing should have been postponed, with a showing either of his own diligence in pursuing discovery or of any prejudice he suffered from the denial of the postponement.

Judgment was entered upon the arbitration award on November 23, 2016.

DISCUSSION

I. Order compelling arbitration

Richard first argues that the judgment should be reversed because arbitration should not have been compelled in the first place. He has made a variety of arguments during the course of this litigation about why Westco's motion to compel arbitration should not have been granted, but in his opening brief on appeal he limits himself to two. First, "[t]he court erred in granting the motion to compel arbitration since it did not consider and determine that the same arguments had been made and ruled on in connection with the Motion to Consolidate." This was the motion Westco filed unsuccessfully seeking to consolidate the present case with Richard's second suit against Henry, superior court case No. 008CECG04214. Richard asserts that the main issue on the motion to consolidate was whether there were sufficient commonalities between the two cases to justify consolidation; the motion to compel turned on the similar issue of whether there was a sufficient connection between Richard's dispute with Westco and the

settlement agreement between Richard and Henry to justify sending the current case to arbitration under the arbitration clause in that agreement. These two issues are so similar, Richard maintains, that the denial of the motion to consolidate should be regarded as dictating denial of the motion to compel.

The discussion of this point in Richard's opening brief is remarkable for its total disregard for the basic requirements of an appellate argument. In this short section of the brief, there is not a single citation of any legal authority or anything in the record—just bare conclusory assertions. The discussion in Richard's reply brief is marginally better—it finally gets around to naming the doctrine (collateral estoppel) on which he relies, for example—but it is still short on citations of authority, and it is too little too late.

The second argument mentioned in the opening brief about the order compelling arbitration is that "Westco waived its right to arbitrate." This statement, almost verbatim, is made one other time in the opening brief, which contains nothing else on the topic. The reply brief mentions in passing that the issue of waiver was mentioned in the opening brief.

We conclude that Richard has forfeited his challenge to the order compelling arbitration by submitting inadequate appellate briefing. (*Associated Builders & Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal.4th 352, 366, fn. 2; *Nielsen v. Gibson* (2009) 178 Cal.App.4th 318, 324.)

II. Order confirming award and denying vacatur

In the trial court, Richard argued that the award should be vacated, not confirmed, because (1) the arbitrator should have granted the requested postponement; and (2) the arbitrator should have granted the motion to disqualify himself. Westco argued against these propositions and also claimed Richard's response to the petition to compel arbitration was untimely. The trial court agreed that Richard's response was untimely, and went on to rule that even if it had been timely, Richard did not show that his

postponement request should have been granted or that the arbitrator should have been disqualified.

A. Timeliness of Richard's response to petition to confirm

Richard argues the trial court erred in refusing to grant relief from the consequences of the late filing of his opposition to Westco's petition to confirm the arbitration award and his request to vacate the award. We agree.

A *petition to vacate* an arbitration award must be filed within 100 days after service of the award on the petitioner. (§ 1288.) A *response to a petition to confirm* an arbitration award must be filed within 10 days after service of that petition, unless the court extends the time for good cause. (§ 1290.6.) Such a response may include a request to vacate the award. (§ 1285.2.) A *response to a petition to confirm that includes a request to vacate* must also be filed within 100 days of service of the award on the respondent. (§ 1288.2.)

These provisions give rise to a question: If the party wishing to challenge an arbitration award misses the 10-day deadline for filing a response (requesting vacatur) to the other party's petition to confirm the award, can the challenger still file either that response or a petition to vacate the award if the 100-day period has not yet expired?

The "consensus" answer among the Courts of Appeal is no. (*Oaktree Capital Management, L.P. v. Bernard* (2010) 182 Cal.App.4th 60, 67.) When a petition to confirm the award has been filed, the 10-day limit trumps the 100-day period for filing either a response or a petition seeking vacatur. (*Id.* at pp. 66-67.)

Westco filed a petition to confirm the award, so the 10-day deadline applied. The petition was served on Richard's counsel on August 23, 2016. Richard filed both a petition to vacate and an opposition to the petition to confirm, in which he requested vacatur. These two filings had identical content and were filed on September 15, 2016, after the 10-day deadline had passed.

Realizing the 10-day deadline had expired, Richard's counsel, Martin Glickfeld, included a request for relief under either section 1290.6 or section 473, subdivision (b).

Section 1290.6, as noted above, gives the trial court discretion to extend the 10-day deadline upon a showing of good cause.

Section 473, subdivision (b), provides in part as follows:

> "The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. Application for this relief shall be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken. . . . Notwithstanding any other requirements of this section, the court shall, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any (1) resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect."

This statute has a discretionary provision (beginning "[t]he court may. . .") and a mandatory provision (beginning "[n]otwithstanding any other requirements of this section, the court shall …").

It has been held that "for purposes of the mandatory provision of section 473[, subdivision] (b), a 'default' means only a defendant's failure to answer a complaint, and a 'default judgment' means only a judgment entered after the defendant has failed to answer and the defendant's default has been entered." (*Vandermoon v. Sanwong* (2006) 142 Cal.App.4th 315, 321.)

To the extent Richard's request was for mandatory relief, it assumed that a failure to file a timely response to a petition to confirm an arbitration award is tantamount to a

failure to file a timely answer to a complaint, and thus can be treated as a default for purposes of section 473, subdivision (b). This assumption is reasonable, since a "petition" in general is or can be a pleading that initiates certain types of actions, and a petition to confirm an arbitration award in particular can be such a pleading and need not be filed in an existing case. (See § 1290 ["[a] proceeding under this title in the courts of this State is commenced by filing a petition."].) For example, if parties submit to arbitration voluntarily before any party has filed a complaint, a petition to confirm an arbitration award could be the first pleading filed in the matter in court. A failure to file a timely response to the petition would then be indistinguishable from a failure to answer a complaint. The trial court accepted this assumption (saying "relief would be mandatory" had Glickfeld made the proper submission under § 473), and it has not been challenged in this appeal. We will not address that question further.

The trial court interpreted Richard's request as seeking either discretionary or mandatory relief under section 473, subdivision (b), and denied both. It denied mandatory relief on the ground that Glickfeld failed to submit the attorney affidavit of fault required by the mandatory provision; and it denied discretionary relief on the ground that Richard did not show that his or his attorney's neglect of the correct deadline was excusable. The court's written order did not mention Richard's request for relief based on a showing of good cause under section 1290.6, but presumably its view was that good cause was not shown.

As will be seen momentarily, mandatory relief under section 473, subdivision (b), is the pertinent form of relief here. We review denial of such relief under the de novo standard, to the extent that disputed facts are not at issue. (*Leader v. Health Industries of America, Inc.* (2001) 89 Cal.App.4th 603, 612.)

The trial court was simply mistaken about the attorney affidavit. Richard's claim for relief from the deadline was supported by Glickfeld's declaration, and Westco does

not claim otherwise. A declaration under penalty of perjury is equivalent to an affidavit. (§ 2015.5.) Glickfeld's declaration stated that he proceeded under the mistaken impression that the deadlines applicable to motion briefs would apply to his responses to Westco's petition to confirm the arbitration award; he failed to discover the applicable statute until too late, and this was why his filings were late under the actual 10-day deadline. The request for relief was in proper form and was within the six-month deadline stated in section 473, subdivision (b), so relief was mandatory.

Westco argues that Glickfeld's declaration tried to cast blame on others. It claims that for this reason, the declaration did not contain a "straightforward admission of fault" as required by *State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 610, and therefore did not satisfy the requirements for mandatory relief under section 473, subdivision (b). We disagree. It is true that Glickfeld's declaration claimed he would have discovered the 10-day rule earlier if not for some behavior of opposing counsel, but it also confessed that he did not figure out which statutory deadlines were applicable at the time when he needed to figure it out, and that this was why his filings were late. This cannot reasonably be interpreted as *not* stating that Glickfeld made a mistake and his mistake caused the deadline to be missed. In *Pietak, supra*, the attorney stated that the late filing was "'not a case of neglect on his part.'" (*Pietak, supra*, at p. 609.) Glickfeld's declaration is not similar.

Finally, Westco contends that the trial court was powerless to grant relief because the 10-day deadline set forth in section 1290.6 is "jurisdictional" in the sense that it is a hard deadline the court is not authorized to extend, as it loses jurisdiction to take the requested action when it expires. Westco cites *Santa Monica College Faculty Assn. v. Santa Monica Community College Dist.* (2015) 243 Cal.App.4th 538, 544-546. There, in rejecting the argument that the trial court should have granted relief from the late filing of a petition to vacate and an opposition to a petition to confirm, the Court of Appeal

asserted that both the 100-day deadline in section 1288 and the 10-day deadline in section 1290.6 were jurisdictional and could not be extended.

In so holding, the court overlooked a crucial distinction between the two provisions. Section 1290.6 provides that the 10-day deadline can be extended for good cause. Section 1288 does not say the 100-day deadline can be extended at all. The 10-day deadline under section 1290.6 *cannot* be jurisdictional in the relevant sense because it expressly authorizes extensions beyond 10 days. And the 10-day deadline is the deadline at issue here. We will not follow *Santa Monica* on this point.

Westco also cites *Abers v. Rohrs* (2013) 217 Cal.App.4th 1199, 1211-1212, for the proposition that the deadline for requesting vacatur of an arbitration award is jurisdictional, but there only the 100-day deadline was at issue, so the case is not on point.

For all the above reasons, we conclude Richard's request to vacate the arbitration award and his opposition to Westco's petition to confirm the award should have been deemed timely filed.

B. Vacatur based on failure to grant postponement

A party's request to vacate an arbitration award should be granted if "[t]he rights of the party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefor." (§ 1286.2. subd. (a)(5).) This provision is "a safety valve in private arbitration that permits a court to intercede when an arbitrator has prevented a party from fairly presenting its case." (*Hall v. Superior Court* (1993) 18 Cal.App.4th 427, 439.) We agree with Richard's contention that the award should have been vacated on these grounds.

The arbitrator has discretion in deciding whether or not to grant a request for a postponement. When a denial of such a request is challenged in the trial court, the trial court must determine whether the arbitrator abused his or her discretion, and whether the

moving party was substantially prejudiced in consequence. We review the trial court's decision de novo, except that to the extent the appellant's challenge turns on disputed facts, we review the trial court's findings for substantial evidence. (*SWAB Financial, LLC v. E*Trade Securities, LLC* (2007) 150 Cal.App.4th 1181, 1196-1198.)

As will be seen, the answer to the question of whether Richard showed sufficient cause for a postponement depends on whether he should have been given more time for discovery, and this in turn depends on the facts regarding his discovery efforts and Westco's responses. There is no material dispute regarding these facts—only a dispute regarding the legal question of whether they amount to sufficient cause for a postponement.[2] Consequently, we review de novo the trial court's ruling that the arbitrator did not abuse his discretion.

After the trial court ordered arbitration in the present case, the parties had their first telephone conference with Broadman on November 4, 2015. During this first conference, Broadman set the arbitration hearing for May 5 and 6, 2016, over Richard's objection that this would allow too little time for discovery. The parties intended to engage in mediation, and Broadman ordered them to agree on a mediator. They did so, and scheduled the mediation for January 24, 2016. Richard says his understanding was that the parties would hold off on discovery until after the mediation.

Subsequently, a dispute developed over the mediation date. At some point in January 2016, Richard's counsel told Westco he had been seriously ill in December and

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[2] The parties purport to disagree about some facts, but the disagreement is only apparent. For example, Richard asserts that Westco did not comply with his discovery requests and Westco says it did comply. But these are merely tendentious descriptions of the underlying facts, which fall between those descriptions and are not disputed: As will be seen, Westco's written response to Richard's document request stated there were no discoverable documents, but afterward Westco produced thousands of pages. Similarly, Westco's written response to Richard's inspection request was a flat rejection, but Westco later said it would not impede inspections by Richard.

the beginning of January, and would not be ready in time. Further, counsel learned that Richard had left the country and would not be back by January 24, 2016. The chosen mediator would not be available again until March. Westco took these statements to mean Richard was refusing to mediate, and arranged a telephone conference with Broadman in February 2016. During that conference, Westco told Broadman it no longer wished to mediate. The plan for mediation was abandoned.

On March 4, 2016, Richard filed a motion for a continuance to complete discovery and a motion challenging Broadman's jurisdiction. Broadman heard the motions on April 6, 2016, and denied them.

Concurrently, Richard pursued discovery. On March 2, 2016, he served a demand for an inspection of Richard and Henry's property and a request for production of documents.

In its response to the inspection demand, Westco objected on multiple grounds: The demand did not specify which parcel or parcels would be inspected, did not say who would carry out the inspection or by what means, and said the inspection would be carried out in a non-obtrusive manner but did not define that term. Further, the inspection would invade tenants' right to privacy and would be unduly burdensome and time-consuming for Westco. The response did not state any terms upon which Westco would comply with the demand. In a letter accompanying the response, Westco's counsel stated that the requested inspection was irrelevant to the claims in Richard's complaint, and suggested that Richard was trying to use "numerous inspections as a tool to continue the arbitration."

The request for production included documents relating to rents collected, records of payments made for expenses related to the properties, documents showing Westco's management fees, documents relating to 1099 forms issued to Richard, documents showing payments to Henry, tax returns related to the properties, financial statements for

the properties, and bank statements for accounts maintained in connection with the properties. Westco's response objected to each request and did not state that anything would be produced, but said Westco was willing to meet and confer regarding documents relating to payments made for expenses incurred on the properties. In the accompanying letter, Westco's counsel stated that all the documents requested were either already in Richard's possession or unrelated to the claims in Richard's complaint.

Westco's discovery responses were served on March 28, 2016. Around the same time, however, despite Westco's statements to the effect that there were no discoverable documents, Westco produced some thousands of pages. Richard's counsel believed this production was disorganized and incomplete, and could not be examined by an accounting expert in the available time, as it was tax season.

Also at about this time, Richard's counsel became aware that at the time of the original mediation with Broadman, Richard received, from counsel who represented him at the time, documents that led Richard's current counsel to doubt Broadman's impartiality. We will discuss that issue in detail later in this opinion.

On April 21, 2016, Richard submitted to the arbitrator a motion to postpone the arbitration hearing. (His motion to disqualify Broadman, submitted at the same time, is discussed below.) Attached to the motion was a copy of a letter Richard's counsel had sent to Broadman and opposing counsel a week earlier. The letter stated that, because of Broadman's prior orders limiting Richard's access to information from and contact with Westco, and because of Westco's incomplete document production and rejection of Richard's inspection demand, Richard was unable to determine the status of his own property and his own financial affairs and consequently unable to present evidence important to his case. The letter mentioned the 1099 form, which purported to report payments to Richard although he had received none, and which Westco had still not coherently explained, through discovery responses or otherwise.

In a declaration submitted with the motion, Richard's counsel stated that it was agreed during the initial telephone conference that discovery would not begin until after the mediation. He served his discovery requests shortly after the plan for mediation unraveled in February 2016. Counsel stated an intention to conduct further discovery stemming from the documents that caused him to doubt Broadman's impartiality. The declaration also stated that counsel's review of the documents produced caused him to suspect that there had been owners' withdrawals from the accounts Westco was maintaining for the property exceeding the $2,500 per month Broadman had ordered for Henry.

Westco's opposition to the motion argued that Richard was short of time because of his own inaction. He could have served discovery during the six months following the initial telephone conference with Broadman on November 4, 2015, and the arbitration date of May 5, 2016. Instead, he waited until March 2, 2016. Westco also argued that Richard had been receiving some of the documents he requested on a monthly basis throughout Westco's tenure as manager of the property, and some others had been produced. Further, Westco had told Richard's counsel it would "not impede" inspections of the property, but could not prepare it or the tenants for any inspections without more information from Richard.

Broadman heard and denied Richard's request for a postponement on May 2, 2016.

The arbitration hearing took place on May 5, 2016. A portion of the transcript from that hearing is in the appellate record. After Richard finished presenting his evidence, Westco moved for a nonsuit. Broadman asked Richard's counsel to assume a breach had been proven and explain how the evidence demonstrated any damages to Richard. (Earlier in the hearing, indeed, Broadman said, "There's been some evidence of a breach" but not of damages.) Counsel mentioned that he had asked Westco's

accountant why the balance of a certain account was reduced by $160,000, and the accountant replied that he did not know. Broadman indicated that this was not enough to show damages caused by a breach, pointing out that, as the plaintiff, Richard had the burden of proof. In the end, Broadman granted the nonsuit motion: "You know, I don't think you get over the damages. I'm not saying that there is a breach. I'm saying even if there was a breach. So I'm going to grant the nonsuit."

As indicated above, Broadman executed an award to this effect and also awarded Westco costs and attorneys' fees. The trial court subsequently confirmed the award. Rejecting Richard's claim that denying the postponement unreasonably deprived him of the opportunity to complete discovery, the court stated as follows in its written order: "[T]he moving papers do not show that plaintiff was diligent in pursuing this discovery, and fails to clearly show how he was prejudiced by the denial of the request to postpone the hearing."

On appeal from the trial court's order confirming and declining to vacate the award, Richard maintains that he established sufficient cause for a postponement and Broadman abused his discretion in denying him one. We agree.

To prevail on his breach of contract claim, Richard had to show that Westco failed to comply with the terms of the property management agreement, and consequently harmed Richard by harming the property, the finances related to the property, or both. Broadman was aware that he had previously limited Richard's ability to obtain records and information from Westco, by denying his request for past records and requiring him to post a deposit with Westco for the privilege of communicating with it in any form except email. Richard had alleged that he received a 1099 form from Westco but had not received the $140,000 in payments it reported and had not been able to determine where the money went; he did not accept Westco's statements that the figure represented net income credited to Richard but not disbursed to him. He had also alleged that the records

he did receive in discovery showed owner draws exceeding the amounts that had been ordered. Westco's response to Richard's inspection demand was a stonewall, indicating that Westco would not accede and accusing Richard of seeking inspection for an improper purpose. Then Westco hedged, telling Richard informally that it would not "impede" an inspection. Westco's response to Richard's document request was also a virtual stonewall, indicating that Westco was obligated to produce almost nothing; Westco hedged on this as well, producing some allegedly disorganized documents responding to the request in part but without withdrawing any of its objections. Richard's counsel indicated he could work with the documents in spite of this, if given time to engage a forensic accountant. Counsel also told Broadman of evidence (detailed below) supporting the request for Broadman's disqualification; and he described additional discovery he would carry out based on this evidence, if given time. All this amounted to sufficient cause to grant a postponement.

Like the trial court, Westco now asserts that Richard was entitled to no postponement because he was insufficiently diligent in pursuing discovery. He could have served discovery requests after Westco answered the complaint on September 22, 2014, or after Westco's petition to compel arbitration was granted on March 16, 2015, or after the matter first came before Broadman on November 4, 2015, when the May 5, 2016 date was set for the arbitration hearing.

Richard had sound reasons for not initiating discovery before he did, however. The answer filed by Westco asserted that the issues in the complaint were arbitrable. Richard technically could have served discovery requests at that point, but it was reasonable to anticipate that, instead of responding to them, Westco would move to compel arbitration and to stay the case in the trial court. Westco did make that motion on January 27, 2015. When the motion to compel was granted on March 16, 2015, no purpose would have been served by initiating discovery at that point because the order

granting the motion stayed the case in the trial court and no neutral arbitrator was available to set discovery rules or rule on discovery disputes until the first meeting with Broadman on November 4, 2015. At that meeting, a plan for mediation was made, and it would have been potentially wasteful and counterproductive to begin discovery while there was a prospect of settlement through mediation, even if the parties did not formally agree to stay discovery while the mediation was pending. The plan for mediation persisted until a conference with Broadman in February 2016, when Westco declared itself no longer willing to mediate and Broadman declined to order mediation. Richard served his discovery requests soon after.

In sum, Richard chose not to serve discovery requests while a motion to compel arbitration was expected, while it was pending, after it had been granted but before the arbitrator was available, or after the first meeting with the arbitrator while the parties were planning mediation. These choices were not dilatory, but instead were consistent with the goals of alternative dispute resolution. And even apart from all these considerations, there was the fact that Richard claimed he had recently uncovered evidence tending to cast doubt on Broadman's impartiality, and had specific discovery in mind to conduct in connection with that issue. This also was part of the sufficient cause Richard presented for a postponement, and was part of the reason why denying a postponement was inappropriate. Finally, the nature of Westco's responses to Richard's discovery requests must be taken into account. A party should not be heard to object to the opposing party's request for a postponement to complete discovery when its less than cooperative stance is partly to blame for the shortness of time available.

Westco argues that Richard has not shown he was prejudiced by the denial of the postponement. We disagree. Richard's counsel named specific unanswered questions he sought to answer by means of the additional discovery he was denied the opportunity to pursue: Where was the $140,000 reported on the 1099 form? Why was the account

about which Westco's accountant was asked apparently $160,000 short? Why did the owners' draws appear greater than expected? What could explain the documents appearing to cast doubt on Broadman's impartiality? Of course, Richard cannot now prove he would have uncovered evidence that would have established his case had a postponement been granted, but that is not required. He has shown that he had important avenues of discovery to pursue, and without the opportunity to do so, he could not establish damages, the sole element on the basis of which Broadman nonsuited him. The denial of the postponement also affected Richard's ability to establish that Broadman should have been disqualified.

For all the above reasons, we conclude the arbitrator abused his discretion in denying the requested postponement, and his award should have been vacated under section 1286.2, subdivision (a)(5).

C. Vacatur based on disqualification of arbitrator

An arbitrator's award must be vacated if the arbitrator "was subject to disqualification upon grounds specified in Section 1281.91 but failed upon receipt of timely demand to disqualify himself or herself as required by that provision." (§ 1286.2, subd. (a)(6)(B).) Section 1281.91, subdivision (d), provides: "If any ground specified in Section 170.1 exists, a neutral arbitrator shall disqualify himself or herself upon the demand of any party made before the conclusion of the arbitration proceeding." Section 170.1, regulating disqualification of judges, requires disqualification if, "[f]or any reason," a "person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial." (§ 170.1, subd. (a)(6)(A)(iii).)

Richard argues that he presented evidence warranting Broadman's disqualification based on a reasonable doubt about his impartiality. Westco denies that he did. The trial court's ruling, which appears not to come to grips with the question of whether a person

aware of the facts might reasonably entertain a doubt that Broadman was impartial, was as follows:

> "Other than the unsubstantiated assertion by counsel that the arbitrator was biased against plaintiff, plaintiff does not clearly identify any conduct that he contends constitutes misconduct by the arbitrator. Plaintiff apparently contends that grounds for disqualification existed because the arbitrator had a financial interest in the properties. However, no admissible evidence of such an interest is submitted. Accordingly, plaintiff has not shown that he was substantially prejudiced by misconduct by the arbitrator, or that grounds for disqualification existed."

Two aspects of the case, both presented to Broadman by Richard at the time of his motion, tended to support Broadman's disqualification. The first consisted of some suspicious documents.

Richard submitted a declaration in support of the motion to disqualify. He declared that in 2008, when the original dispute between Richard and Henry was in mediation, Broadman at a mediation session recommended that the parties sell their property. Richard also received a set of proposed listing agreements prepared on standard forms by Ron Stumpf, a real estate broker. In this set were six discrete documents, dealing with various individual properties, that included the following provision, or words to the same effect: "25% of Stumpf and Company's sales commission on the listing agents side shall be paid as a referral to Howard Broadman."

Richard's declaration also authenticated a copy of a letter to him from his former counsel, D. Mitchell Taylor. The letter first addressed a provision Richard had wanted (reflected in the proposed contracts Richard received) and then stated that Broadman had insisted that the documents be signed by the parties:

> "Further, with regards to the matter concerning the real estate broker, Mr. Stumpf, you will find the addendum enclosed which specifically provides that if you or Henry buys the other out there are no commissions to be paid. This was a concern of you, and therefore, I have forced the issue with Mr. Stumpf and made him provide us with this

addendum. *The entire contract is enclosed and you need to sign it as Judge Broadman is demanding the same*." (Italics added.)

Richard's declaration further stated that it was his "understanding that Judge Broadman was demanding that I sign these documents which gave him a referral fee." It also said Richard informed his current counsel, Martin Glickfeld, about this matter a few weeks before the date of the declaration, April 21, 2016. Glickfeld's declaration in support of the motion to disqualify stated that, if given a postponement, he intended to depose the real estate broker. Glickfeld also declared that, in a prior telephone conference with Broadman, he had described to Broadman the listing agreements with their commission provisions. Broadman had made no comment in response.

Glickfeld's declaration in support of Richard's request to vacate the arbitration award also referenced these documents. It stated that, at the hearing before Broadman on the motion to disqualify, Broadman swore himself in and testified that he had no recollection of the listing agreements or a demand that they be signed.

The third document authenticated by Richard's declaration was a copy of a letter Richard received from Broadman in January 2015. The letter is perplexing. It is headed with Westco's name, address and telephone number, and dated January 29, 2015. It is addressed to Richard and Henry and has a signature block (but no signature) containing Broadman's name and address. It has this subject line: "Subject: RE: Request Approval for Capital Expenses Castaneda Properties." The text states:

> "I am approving the request subject to the following. Please send this order to both of the parties by certified mail and they have 10 days after mailing to object in writing to you and me. Thereafter, if we have not heard from them you are authorized to proceed.
>
> "Below are the scheduled capital projects for 2015 that we are requesting your approval:"

This is followed by a table showing property addresses, project descriptions (e.g., "Install new roof"), vendors, and prices.

At the bottom of the letter is a list of people who were copied by email. Glickfeld is one of these, but his declaration states that he never received the letter and the email address attributed to him is not his.

As far as we can tell, the letter seems to be a mishmash of a request from Westco for Broadman's approval of capital expenditures on Richard and Henry's property and Broadman's answer to Westco approving these expenditures, crammed together on Westco letterhead and sent to Richard and Henry, perhaps by an uncomprehending Westco staff member. In fact, a declaration by Lee Brand, president of Westco at the time, stated that "[s]ince Westco took over as property manager of the Subject Property, it has submitted proposed capital expenses . . . to Judge Broadman for his approval." Attached to the declaration as an exhibit was Westco's request for approval of capital expenses for 2015. The exhibit is an email message from Brand to Broadman dated January 23, 2015, portions of which evidently were copied verbatim into Broadman's letter of January 29, 2015.

In one of his declarations, Glickfeld expressed his concern that, by showing how Broadman ran his decisions on Westco's expense requests out of Westco's offices, this letter suggested a closer business relationship between Broadman and Westco than the arm's-length relationship of an arbitrator with a property manager he merely selected to settle a disagreement between parties.

The second aspect of the case tending to support Broadman's disqualification is the extraordinary degree of control he exercised over the parties and their property, treating Westco as if it were his agent rather than the agent of Richard and Henry. This control was manifested first in Broadman's rulings in the prior case between Richard and Henry. As the matter of the letter from Broadman on Westco's letterhead indicated, repair and improvement plans did not come from Richard or Henry and Broadman's role regarding them was not merely to resolve disputes between the parties. Instead, the plans

originated with Westco, were approved by Broadman, and then were presented to the parties, who then could raise a challenge to them to be resolved by Broadman. Some rulings appeared to be designed to settle difficulties Westco was having with the parties—they wanted Westco to provide documents, they pestered Westco staff, they arranged for repairs and leased units without going through Westco—rather than disputes between the parties. Broadman rejected *both* parties' requests to remove Westco as property manager, even though the property management contract gave the parties the power to terminate the contract on 30 days' notice. Broadman purported to diagnose the "social pathology" of Richard and Henry and to perceive dangers to their mental health, which he said necessitated the taking of steps by him—for the parties' own good—to regulate their behavior so that their relationship with a property manager could continue. He stated that the relationship that must continue was with Westco "or another property management company," but it was in the same order that he barred the parties' separate attempts to get rid of Westco.

Broadman's remarks at the arbitration hearing in the present case further indicated the depth of his involvement in managing the property, as opposed to arbitrating disputes between Richard and Henry over the management of the property.

At one point, Glickfeld suggested that Westco was profiting improperly from the repairs and capital improvements on the property by using "its folks" to carry out the work and then billing with a markup like an outside contractor; he implied that this would be a breach of the property management contract. Westco's counsel argued that "using our people" was not a breach because it had been disclosed in monthly reports since the beginning of the property management contract. Referring to these reports, Broadman said that Richard had been hearing since the beginning of the property management contract that "I'm—to use your phrase—self-dealing," but had not done anything about it

until he filed the present suit in 2013. Then he suggested that the suit might be barred by laches for this reason.

Broadman's remark is curious. Why would he say the accusation was that *he* was self-dealing? Broadman's identification of himself with Westco in this context tends to support the contention in Richard's opening brief on appeal that Broadman had a "personal stake in the orders he had made regarding Westco's management activities." The personal stake could be an emotional or professional investment, or the receipt of arbitration fees arising from hours spent actively making management decisions about the property instead of waiting for specific disputes to be brought to him, or even an arrangement with Westco analogous to the one allegedly in contemplation between him and Stumpf.

This was not the only remark Broadman made during the arbitration hearing that tended to indicate he viewed Westco's actions as his actions, and his actions were driven by a personal motivation rather than by the needs, interests and arguments expressed by the parties. When Glickfeld was expressing concern that the accounts for the property were being drained and soon there would be no money left, Broadman interrupted and said high costs had been incurred for maintenance and repairs: "[W]e spent a lot of money maintaining and fixing these properties. They're in much better shape now than they were when I started this job. That's unquestionable in my mind based on the reports that I'm aware of, the properties are much better now." The condition of the properties came up again later when Glickfeld said he did not know their condition because no inspection had taken place. Broadman expressed disbelief: "How could you not know it's much better?" he asked. "Have you ever see[n] any pictures, did anyone ever show you any pictures?"

Finally, just before the end of the hearing, Broadman explained to Glickfeld that his decisions on the management of the property were for the best even if Richard and Henry both opposed him:

> "So all this capital money we … were spending before was still in your client's benefit and that was really unfair in some ways to Henry because I was taking income and improving the property which is inure to your client's benefit.
>
> "And the argument that Henry's lawyers would make is that this isn't fair, this old guy needs the dough and you're not giving him enough money. And you're using it to improve the property that Richard's going to ultimately get.
>
> "And so this is really unfair, Judge Broadman, [Henry's lawyers would say,] because you're taking Henry's income now which is all going to inure to Richard's benefit upon Henry's death. And there's some real legs to that argument in my mind but I had to balance them. That's what judges do, we balance things. And that was the balance that I came out with.
>
> "So in many ways your argument's against your client's ultimate best interest. Because what's happening is I'm taking substantial amounts of money and saying improve the property that Richard's going to end up with.
>
> "So I want that from underneath the table to on top of the table. Because it's a big deal from Henry's viewpoint. And he's not here and he's not represented, but it was a factor that I really had lots of argument about when we had this fight the last time. Because Henry says, I don't want to improve it that much, we improve it that much because, I'm supposed to get all the net income and you're stealing my net income. And I'm 90 years old, at that time he was close to 90, he's probably over 90 now. So I wanted to make that point."

Broadman immediately went on to find damages were not proved and to grant the nonsuit motion.

Here, Broadman was both taking ownership of the decisions proposed by Westco and approved by him, and saying they are supported by his independent view of the good of all concerned, despite the opposition of Richard and Henry.

Broadman's behavior as summarized here—rejecting requests made by both parties, saying he had to take control of the parties because of their terrible relationship, "social pathology" and mental health issues, telling Richard's counsel the course he was pursuing on Richard's behalf was against Richard's interests—sounds more like that of a conservator or a trustee than that of an arbitrator. Broadman's control of Richard and Henry's property and business and his seeming belief that he could manage their affairs as he saw fit, independently of Richard and Henry's wishes or the existence of specific disputes between them, created opportunities for taking the sort of advantage instantiated by the apparent commission kickback arrangement from the prior case. The evidence that Broadman could have been acting from motivations such as these and not from a detached and impartial view of the case supported a postponement for additional discovery on the impartiality issue, and this reinforced the claim for a postponement for additional discovery on the merits, as we have said. With additional discovery, Richard might have been able to strengthen his case for disqualification.

As for the disqualification claim as actually made, the trial court rejected Richard's motion on the grounds that "[o]ther than the unsubstantiated assertion by counsel that the arbitrator was biased," Richard did "not clearly identify any conduct that he contends constitutes misconduct" by Broadman, and he had presented "no admissible evidence" of an improper financial interest on Broadman's part. The court did not specify the evidence it had considered or explain why it was inadmissible.

For the reasons set forth above, we conclude there was a significant amount of evidence before the trial court supporting the claim that a reasonable person could entertain a doubt about Broadman's impartiality. As the court was clearly mistaken in its view that Richard presented nothing but an "unsubstantiated assertion" and failed to identify any conduct that supported his claim, we conclude the trial court failed to give substantive consideration to the evidence. Were we not reversing for a different reason,

we could remand with directions to reconsider the evidence on this issue. As it is, for purposes of any subsequent litigation of the matter, we merely deem the questions of the admissibility and sufficiency of any evidence relevant to disqualification not to have been properly decided in the first instance. If the matter ends up before Broadman again, Richard will have the opportunity to raise the disqualification question again, assuming he will not again be denied reasonable time to conduct discovery.

DISPOSITION

The judgment is reversed. The matter is remanded to the trial court to vacate its order confirming the arbitration award, enter a new order vacating the award, and conduct further proceedings consistent with this opinion. Costs on appeal are awarded to appellant Richard Castaneda.

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SMITH, J.

WE CONCUR:

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PEÑA, Acting P.J.

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DESANTOS, J.